

MASSACHUSETTS BAR EXAMINATION

SECOND DAY FEBRUARY 26, 2009

ESSAY SECTION

MORNING PAPER QUESTIONS

1. Green was co-owner of Regent Hotel (“Regent”) with White, Blue and others. White and Blue also owned Supreme Hotel (“Supreme”), then under construction, in which Green had no interest. In order to complete construction of Supreme, White approached Lender for a \$500,000 loan. White represented to Lender that he, Blue and Green owned Supreme. During the application process between White and Lender, White provided Lender with an altered form of Green’s financial statement that described Green as an owner of Supreme and with promotional literature showing Green, White and Blue actively engaged in managing both Regent and Supreme.

Lender approved the loan and prepared a \$500,000 promissory note for the signatures of Green, White and Blue. Lender did not follow its normal closing procedure of having all borrowers present at Lender’s offices to execute loan documents. Lender’s President, apparently to accommodate White with hope of getting more business, allowed White to take the promissory note and other loan documents out of Lender’s offices to get the signatures of Green and Blue. White presented Lender’s promissory note in a stack of documents to Green that White represented were part of the financing of planned renovation projects at Regent.

The promissory note was titled in capital letters, “Bank Commercial Loan Note \$500,000” and contained the following words above the signature lines, “if this note is signed by more than one person, their liabilities shall be joint and several.” Without reading the promissory note, Green signed the promissory note under the signatures of White and Blue. Following White’s instructions, Lender, after receiving the executed promissory note from White, deposited \$500,000 into Supreme’s checking account at Lender. Lender was not aware of the circumstances related to Green’s signing of the promissory note. Green was not aware of Lender’s loan.

White and Blue made all payments on the loan to Lender for a year. Lender then sold the promissory note to Commerce. White and Blue stopped making payments and the loan went into

default. Green had no knowledge of the loan until the default. Commerce demanded payment but neither Green, White nor Blue made any payments. Commerce brought an action in Superior Court against Green, White and Blue to collect the promissory note.

What are the rights of the parties?

2. Amy worked as acquisitions manager for Developer, a real estate developer. Developer sought to purchase Smith Farm from Smith and directed Amy to do so for him. Since Amy felt that Smith's price would be substantially higher if he knew that Developer was the buyer, Amy asked her brother, Bart, who owned a farm near Smith Farm to purchase Smith Farm in his own name for Developer. Bart orally agreed to do so. In return, Amy orally agreed to attempt to purchase Jones Farm, the farm next to Bart's farm, in her name for Bart. Because Bart and Jones, the owner of Jones Farm, were feuding over a boundary dispute, Bart was certain that Jones would not sell to him.

Bart purchased Smith Farm with funds supplied by Developer, taking title in Bart's name and agreeing orally to deed the property to Developer at a later date. Over the course of the following year, Amy made several attempts to purchase Jones Farm for Bart, keeping Bart informed of her efforts. When Amy was finally able to persuade Jones to sell, she purchased Jones Farm in her own name and with her own funds for \$250,000. Amy did not tell Bart about the purchase.

Later, Amy needed \$100,000 to pay off a loan, and she asked her friend, Corey, to loan her the money. Corey agreed to do so only if Amy deeded Jones Farm to him as security. Amy gave Corey a quitclaim deed to Jones Farm, which Corey recorded, and Corey loaned Amy the money.

Bart has learned of Amy's purchase of Jones Farm and its subsequent transfer to Corey. Bart has demanded that Jones Farm be sold to him for \$250,000, the amount Amy paid to Jones, but Amy has refused. In return, Bart has refused to deed Smith Farm to Developer. Amy has attempted to repay in full the \$100,000 loan to Corey, but Corey has refused to accept payment and to deed Jones Farm back to Amy, asserting that he is the outright owner of Jones Farm. Corey has also told Amy that he mortgaged Jones Farm to Savings Bank for a \$50,000 loan which remains outstanding.

What are the rights of the parties to Smith Farm and Jones Farm?

3. Jane sued her former employer Widget Corporation (“Widget”) in the Superior Court alleging that Sam, Widget’s President, had sexually harassed her for many years.

At trial, the following evidence was admitted over objection:

- (A) Jane testified that when she recently confronted Sam about his sexual harassment of her, he told her that his personal lawyer told him that “it was not sexual harassment as long as the other person liked it.”
- (B) Jane testified that she had overheard two female Widget accountants complaining to each other about Sam harassing Jane and that one of them had said “Someone should sue that jerk, he treats women like dirt.”
- (C) Paula, Sam’s wife, testified that Sam sent her a private email in which Sam confessed to sexually harassing Jane. In addition, Paula testified that one day, when she and Sam were driving together with their baby daughter to church, Sam told her that he had sexually harassed Jane.
- (D) Jane introduced into evidence Hospital’s record of Jane’s last yearly physical examination in which Bill, Jane’s physician, wrote that Jane suffered from “post traumatic stress disorder as a result of sexual molestation by Sam.”
- (E) Sam introduced into evidence the pre-trial deposition testimony of his former secretary, Nancy, in which Nancy testified that Jane had stated the following to her: “I love to flirt with Sam, and I also love it when he flirts back – he is such a sweet guy.” At the time of the trial, Nancy was in jail in another state awaiting trial on tax evasion charges.
- (F) On Jane’s cross-examination of Martha, a psychiatrist hired by Widget to testify at the trial, Jane introduced into evidence a written report of a peer review committee of the hospital that employed Martha. The report contained the peer review committee’s conclusion, after investigating the death of one of Martha’s patients, that Martha was “incompetent” and “unprofessional.”

In each instance, were the Trial Judge’s rulings to admit correct?

4. Dave owned and operated a grocery store in Town where Betsy was employed as a cashier. Due to an economic downturn, Dave told Betsy that he had to let her go. Betsy was upset and sent a letter to Inspector, who was employed as Town's health inspector, alleging numerous health code violations at Dave's grocery store. Betsy also sent a copy of the letter to Newspaper, a Massachusetts corporation with a principal place of business in Massachusetts. Inspector commenced an investigation into Dave's business. Newspaper also ran a story detailing the allegations contained in Betsy's letter. Sometime later, Betsy admitted that she had made up the alleged violations. Subsequently, at the conclusion of his investigation, Inspector cited Dave for numerous health code violations, including violations which Betsy admitted were untrue. Inspector also caused criminal proceedings to be commenced in Massachusetts state court against Dave for the violations. Dave lost significant business and was forced to close his grocery store.

Dave filed an action in state court against Betsy and Newspaper alleging defamation, libel and slander, and tortious interference with contractual relations. Dave had a deputy sheriff serve the complaint and summons upon Betsy at her last and usual place of residence. Dave served the complaint and summons by certified mail on Newspaper at its principal place of business. Dave also filed an action in the United States District Court against Inspector asserting various state and federal claims. In the federal court action, Dave alleged that Inspector commenced the investigation and criminal charges to close Dave's grocery store because of Dave's long-standing dispute with neighbors about traffic and hours of operation. In the federal court action, Dave also sought injunctive relief seeking to stay the criminal proceedings commenced against him by Inspector.

In the civil state court action, (a) Betsy filed a motion to dismiss Dave's complaint claiming that her actions constituted protected petitioning activities, and (b) Newspaper filed a motion to dismiss Dave's complaint for inadequate service of process.

In the federal court action, Inspector filed a motion requesting that the Court refrain from exercising jurisdiction.

How should the courts rule on the respective motions?

5. Harry and Wanda are residents of Massachusetts. They married in 1974. Harry and Wanda had two children, Doris and Bob, who are now adults. In 1984, Harry executed a will that included the following terms:

- a. "Fifty percent ownership of my home and the right to remain there for as long as she desires to my wife Wanda;"
- b. "Fifty percent ownership of my home to my children to be shared equally;" and,
- c. "The remainder of my estate to Wanda."

During their marriage, Harry handled all of the household finances. In 1994, Harry retired and Harry and Wanda began spending winters in Florida. While Harry and Wanda were in Florida, their son-in-law, Sonny, took care of all of Harry's and Wanda's Massachusetts household expenses. Harry and Sonny enjoyed a close relationship. Harry trusted Sonny.

In March 2004, Harry hit the lottery for \$1,000,000. Shortly thereafter, Harry was diagnosed with terminal cancer and was treated with high doses of anti-anxiety and narcotic medications.

In April 2004, Harry discussed with Sonny the need for a new will. Harry informed Sonny of his wish that his entire estate be given to Sonny's wife, Doris, under the new will. Wanda and Bob were to be specifically excluded under the new will. At Sonny's suggestion, Harry hired Attorney. Attorney was an acquaintance of Sonny and Sonny introduced Harry to Attorney. Sonny owed Attorney \$50,000 in unpaid legal bills from Attorney's unsuccessful representation of Sonny in a personal injury case.

Two days later, Harry's condition declined and he was admitted to the hospital and treated with additional medications to reduce his pain. Sonny quickly summoned Attorney to the hospital, whereupon Harry hurriedly executed the new will. Sonny and Attorney's Secretary witnessed the execution of the new will. Harry died two days later.

Wanda, as executrix, filed a petition to probate Harry's 1984 will. Doris, as executrix, filed a petition to probate Harry's 2004 will.

What are the rights of the parties?

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AFTERNOON PAPER QUESTIONS

6. Smith purchased lots 61 and 65, Pond Street, Davisville, from Mary. Smith's lots were shaped like a "pork chop," each with an impassable narrow strip of land at its easterly end. Smith's access to the lots was through a deeded easement from Mary over her property. Smith learned that Mary filed a subdivision plan for the land adjacent to Smith's lots, including the land containing Smith's easement. Mary's filed subdivision plan denied Smith access to his lots.

Smith, while Mary's subdivision plan was pending before the Davisville Planning Board, discussed with Mary a land swap: Smith would convey the easterly portions of his lots to Mary in exchange for two other lots, lots 46 and 50. The land swap gave Smith access to the proposed road and gave Mary more buildable lots. Mary's subdivision plan was subsequently approved by the Davisville Planning Board.

Then, Mary and Ray entered into a purchase and sale agreement for all of the subdivision lots on Pond Street for \$2,000,000, including lots 46 and 50. Thereafter, Mary and Ray amended the agreement to extend the closing date and to increase the purchase price but no amendments concerned the land swap with Smith. Ray doubted whether the additional lots that would result from the land swap were buildable.

Mary entered into the land swap agreement with Smith without telling Smith about the sale to Ray.

At the closing, Ray told Mary that he was not bound by Mary's land swap agreement with Smith "but would try to work something out with him." Neither Mary nor Ray told Smith of their transaction. Smith learned of Mary's sale to Ray when Ray started clearing the lots. Ray refused to swap land with Smith pursuant to Smith's agreement with Mary. Ray offered to

negotiate agreements for different lots with Smith. Ray had already conveyed lots 46 and 50 to other buyers.

In January 2002, Smith brought an action against Mary and Ray in Superior Court, alleging that Mary breached the land swap agreement and Ray was obligated to complete the land swap as negotiated by Mary.

What are the rights of the parties?

7. Mary and Frank were married and the parents of an infant son, Sam. They lived in a first floor apartment in a building owned by Lenny. The building was located in a high-crime area of City, and there had been several break-ins at the building during the previous year.

While Frank was away one day, Mary left Sam asleep in his crib in the apartment and ran across the street to a store to buy milk and diapers for Sam. Intruder, armed with a knife, entered the apartment through a window which was broken and could not be locked. Both Mary and Frank had made several requests to Lenny to fix the window, but Lenny had repeatedly ignored their requests.

While in the apartment, Intruder stabbed Sam in order to stop him from crying and then fled. Mary returned to the apartment a few minutes later and discovered Sam in his crib, bleeding from his wounds. Mary became hysterical and suffered a heart attack. Sam died hours later.

Since Sam's death, Mary's health has declined, and she suffers from severe anxiety and depression. Mary hardly speaks to Frank and refuses to go anywhere or do anything with him.

What are the rights of the parties?

8. Al, a police officer, stopped a car driven by Bob for speeding. During this traffic stop, Al detected the smell of marijuana coming from Bob's car. Al ordered Bob to exit the car, and then Al patted down Bob's body. Al found an unregistered handgun in Bob's pocket and placed Bob under arrest. Al then searched the car and found a large bag of cocaine in the car's glove compartment. Bob then said, "The drugs are not mine - this car belongs to my brother Charles."

After dropping off Bob at the local police station for booking, Al drove to Charles' house. As the front door to Charles' house was open, Al walked into Charles' house. Al then heard a voice from behind a closed door in Charles' house say "Let's load up the stuff now." Al drew his gun, opened the closed door, and saw Charles and Dick loading bags of marijuana into large duffle bags. On the table in the middle of this room was a sawed-off shotgun. Al placed Charles and Dick under arrest. Charles asked if he could use his cell phone to quickly call his lawyer and Al agreed to let him make that call. Charles then called his lawyer Eddie, and Al overheard Charles say that he needed Eddie to go to the local STORE-ALL-OF-IT, retrieve a yellow box from Charles' storage unit and "put it in a very safe place."

Al then procured a search warrant for Charles' unit in the STORE-ALL-OF-IT facility. Al went to STORE-ALL-OF-IT, and entered Charles' storage unit where he found Eddie picking up a yellow box. Al grabbed and opened the yellow box, over Eddie's objection, and found several pounds of heroin. Al arrested Eddie and seized the yellow box.

A. What crimes have Bob, Charles, Dick, and Eddie committed?

B. At their criminal trials, Bob, Charles, Dick, and Eddie have moved to suppress the admission into evidence of the unregistered handgun, the cocaine, the marijuana, the sawed-off shotgun, and the heroin.

How should the Court rule?

9. City, a municipal corporation in Massachusetts, operated a public school system. City's schools were experiencing significant racial imbalance. Several schools in City's school system had a percentage of nonwhite students significantly greater than the percentage of nonwhite students in City's school system as a whole. In general, City's school system was plagued by high absentee rates, racial tension and low test scores. In 2006, to remedy racial imbalance and improve the schools, City instituted a School Improvement Plan ("the Plan") which categorized schools as "racially balanced" or "racially imbalanced". Under the Plan, each student could attend his or her neighborhood school. A student who did not wish to attend his or her neighborhood school could apply to transfer to another school in City's school system. Approval of the transfer depended, in large part, on the requesting student's race and the racial makeup of the sending or receiving schools. Under the Plan, a student in a "racially balanced" school could transfer to another "racially balanced" school without regard to race. A transfer that would increase the racial imbalance in either the sending or receiving school was not permitted. Mary is the mother of a student who was denied a transfer request by City's school system because the transfer would increase the racial imbalance under the Plan.

In an effort to create a more cohesive and unified student body, the Plan required that each student participate in the recital of the Pledge of Allegiance before the start of classes each morning. Frank, father of a student attending City schools, is an atheist and objected to the recital of the Pledge of Allegiance because it contained the phrase "under God". A voluntary parent organization called Parents Organized for City Schools ("POCS") also opposed the Plan.

Mary, Frank and POCS filed suit in United States District Court against City alleging the Plan was unconstitutional.

What are the rights of the parties?

10. Sally and Mike met during their final year of medical school in Massachusetts. While they were dating, Sally became pregnant and they got married. Two days before their wedding, Sally insisted that Mike sign an agreement drafted by Sally's lawyer. A day later Mike signed the agreement which contained the following provisions:

(A) "Individual property of each party, as well as any appreciation thereon, shall remain the party's sole and exclusive property; and," (B) "Neither party shall have a claim to alimony from the other."

Sally and Mike settled in Massachusetts with their new son, Brian. Sally's medical career was successful and her earnings skyrocketed. Sally built an office complex in nearby Busytown on a lot she had acquired with her father prior to her marriage. The land along with the newly built office complex was valued at \$2,500,000.

After two years of practicing medicine, Mike became disenchanted with his medical career. Mike left his position and began helping Sally at her medical practice doing the bookkeeping and medical records work. Soon thereafter, Sally gave birth to twin girls. Mike and Sally agreed that Mike would stay at home over the next ten years to raise their three children. Mike was primarily involved in managing all of their children's home, school and sporting activities.

During their marriage, Sally and Mike built a home valued at \$1,000,000. Sally and Mike held title to the home as tenants by the entirety. In order to build the home, Sally used \$250,000 from the sale of a condominium that she owned before their marriage and Mike contributed \$10,000 withdrawn from his retirement fund. Sally and Mike borrowed the remaining funds to build the home. Sally paid the monthly mortgage on the home as well as the household operating expenses.

Sally resumed a romantic affair she had previously with Doctor from New York during their last year of medical school. Mike learned of the affair and became despondent when Sally

informed Mike that Doctor was Brian's biological father. Mike began to drink heavily and turned verbally abusive toward Sally. Sally informed Mike that she had filed for divorce. The next day, Mike discovered that Sally had moved to New York with the children.

Mike is seeking the return of the children to Massachusetts along with custody and support. In addition, Mike seeks alimony and an equal division of the marital estate.

Doctor has filed for an adjudication of paternity and full custody of Brian.

What are the rights of Mike, Sally and Doctor?